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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

T&W FUNDING COMPANY XII, L.L.C., et al.,)	
)	
)	
Plaintiffs/Counterclaim Defendants)	
)	
vs.)	Case No. 01-2293-JAR
)	
PENNANT RENT-A-CAR MIDWEST,)	
INC, et al.,)	
)	
Defendants/Counterclaim Plaintiffs)	
_____)	
)	
PENNANT RENT-A-CAR MIDWEST, INC.,)	
)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
LYON FINANCIAL SERVICES, INC., d/b/a/)	
US BANCORP PORTFOLIO SERVICES, et al.,)	
)	
Third-Party Defendants.)	
_____)	

**MEMORANDUM AND ORDER DENYING MOTION TO DISMISS AND DENYING
REQUEST FOR LEAVE TO AMEND AS MOOT**

This matter comes before the Court on plaintiffs’/counterclaim defendants’/third-party defendants’ Motion to Dismiss Counts III, IV and VI of the Amended Counterclaims and the Third-Party Complaint in its Entirety (Doc. 164). In response, defendants/counterclaim plaintiffs object to

dismissal and request leave to amend (Docs. 166 and 167).

Background

This case has a protracted litigation history. Highly summarized, the trial set to begin November 5, 2002, was continued when TAC filed a renewed motion to dismiss challenging this Court's subject matter jurisdiction because plaintiffs' claim did not survive bankruptcy. Following a highly contentious adversary proceeding before the United States Bankruptcy Court for the Western District of Washington, the bankruptcy court determined that the Settlement Agreement was not an executory contract and was not deemed rejected; the effect the breach of the Settlement Agreement was left for this Court to litigate under applicable state law. TAC appealed the bankruptcy court's order; the Court is unaware of the outcome of that appeal.

On September 24, 2003, the Court issued an order (Doc. 150) denying TAC's motion to dismiss and plaintiffs' cross-motion for summary judgment. In a separate order issued in a related action brought by TAC,¹ the Court dismissed the action without prejudice for TAC to amend its action and/or counterclaims in this action. TAC filed its amended answer as well as an amended counterclaim/third party complaint (Doc. 153), which plaintiffs have moved to dismiss. At a status conference before Magistrate Judge O'Hara, the parties reported that the case might settle. Since that time, a number of filings by the parties apparently evidences that settlement negotiations have not been successful. The dispositive motion deadline remains set for September 20, 2004, and trial is set for March 14, 2005. Discovery is ongoing, having been continued until September 20, 2004.

¹*Pennant Rent-A-Car Midwest, Inc. v. USBancorp Portfolio Services and Lease Dimensions, Inc.*, Case no. 02-4190-JAR.

Analysis

Pursuant to Fed. R. Civ. P. 12(b)(6), plaintiffs move to dismiss Counts III, IV and VI of the Amended Counterclaims and request the Third-Party complaint be dismissed in its entirety. A court may dismiss a complaint for “failure to state a claim upon which relief can be granted.”² Dismissal is appropriate “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”³ “The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.”⁴

On a Rule 12 (b)(6) motion, the court judges the sufficiency of the complaint accepting as true the well-pleaded factual allegations and drawing all reasonable inferences in favor of the plaintiff.⁵ The court construes the allegations in the light most favorable to the plaintiff.⁶ These deferential rules, however, do not allow the court to assume that a plaintiff “can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.”⁷ “[I]f the facts narrated by the plaintiff ‘do not at least outline or adumbrate’ a viable claim, his complaint cannot pass Rule

²Fed. R. Civ. P. 12(b)(6).

³*Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citation omitted).

⁴*Mounkes*, 922 F.Supp. at 1506 (quotation omitted).

⁵*Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987).

⁶*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

⁷*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (footnote omitted).

12(b)(6) muster.’⁸ Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interest of justice.⁹

The issues at the heart of the motion to dismiss center on whether a fiduciary relationship existed between the parties. Although this is a question of law to be determined by the court,¹⁰ the parties hotly dispute whether the factual circumstances surrounding the Settlement Agreement created a fiduciary duty and any concomitant duties stemming therefrom. The Court’s discretion to resolve this issue in the context of a Rule 12(b)(6) motion is constrained by the highly subjective inquiry imposed by Kansas courts, and the issue would be more appropriately addressed on summary judgment after discovery is complete. In that same vein, the Court further declines to dismiss the allegedly duplicate claims of quantum meruit and unjust enrichment, leaving these issues for determination on summary judgment as well.

Moreover, in its response to plaintiffs’ motion to dismiss, TAC requests leave to amend its third-party complaint to include claims for breach of contract and equitable recovery against the third-party defendants, which may or may not impact the issues raised in the motion to dismiss. TAC has the right to amend its pleadings any time prior to the filing of a responsive pleading.¹¹ Because plaintiffs’ motion to dismiss is not a responsive pleading within the meaning of Rule 15(a), TAC was free to

⁸*Mounkes v. Conklin*, 922 F.Supp. at 1506 (citing *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988) (quotation omitted)).

⁹*Id.*

¹⁰*See First Bank of WaKeeney v. Moden*, 681 P.2d 11, 13 (1984).

¹¹Fed. R. Civ. P. 15(a).

amend its complaint without requesting or receiving leave of the court.¹² The motion for leave to amend the counterclaim and third-party complaint is therefore moot.¹³

Finally, given the posture of this case, deferral of the issues raised in the motion to dismiss is not inappropriate—the discovery and dispositive motion deadline is September 20, 2004. Discovery is ongoing, and the pretrial conference is scheduled for September 24, 2004. These deadlines may or may not need to be adjusted given the amendment of the third-party complaint.

IT IS THUS ORDERED BY THE COURT that plaintiffs’ motion to dismiss (Doc. 164) is DENIED;

IT IS FURTHER ORDERED that TAC’s request for leave to amend its third-party complaint (Doc. 167) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated this 1st day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

¹²*Brever v. Rockwell International Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994).

¹³Although plaintiffs argue TAC’s original motion to amend was procedurally deficient in that it failed to attach a proposed amendment, leave to amend was not required as TAC was entitled to amend as a matter of right. TAC subsequently filed an Amended Counterclaim/Third-party Complaint (Doc. 172). The deadline for filing amendments to pleadings was February 20, 2004; TAC’s original request to amend was filed February 9, 2004. Under these circumstances, the Court finds that TAC’s amendment was timely.